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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION STAMP NO. 12462 OF 2015

Aktar Qureshi alias Aktar Kamlu Qureshi and another .. Petitioner

Vs.

Gazebo Restaurant and Departmental Store
Private Limited and another .. Respondents

Mr.Vikram Sathaye a/w Mr.S.K.Mulani & Mr.Dileep Satale i/b Mulani
& Co., Advocates for the Petitioners.

Ms.Martina Sapkal a/w Ms.Deepa Ahuja i/b Arun Sapkal & Co.,
Advocates for Respondent No.1.

Mr.Atul Damle, Senior Advocate i/b Mr.Prakash N.Wagh, Advocate
for Respondent No.2.

CORAM : R. G. KETKAR, J.

DATE : 01st JULY, 2015

P.C. :

. Heard Mr.Vikram Sathaye, learned Counsel for the petitioners and Ms.Martina Sapkal, learned Counsel for respondent No.1 and Mr.Atul Damle, learned Senior Counsel for respondent No.2 at length. Rule. Learned Counsel for respective respondents waive service. At the request and by consent of the parties, rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, original defendants have challenged the judgment and order dated 25/02/2015 passed by the learned Judge, City Civil Court at

Greater Mumbai in Notice of Motion No. 3942 of 2014 in Suit No. 3526 of 2010 (High Court No. 998 of 2010). By that order, the learned trial Judge dismissed the Motion taken out by the petitioners for marking exhibit to certain documents viz. original delivery challans.

3. In support of this Petition, Mr.Sathaye submitted that petitioners had filed affidavit of examination-in-chief of Mr.Rizwan Ghawte under Order 18 Rule 4 of Code of Civil Procedure, 1908. It is stated therein that petitioner No.1- Akhtar Qureshi has inadvertently filed various photocopies instead of original delivery challans given by affiant to him on various occasions on purchase of goods. At the time of cross examination of Nadeem Shaikh and Anil Chaturvedi dated 25/09/2014, it was realised by lawyers that photocopies of delivery challans were filed with the affidavit and his earlier affidavit which was made on 22/08/2014. In view thereof, Rozwan Ghawte did not tender in evidence earlier affidavit dated 25/09/2014. After taking original delivery challans from Akhtar Qureshi, he has filed those delivery challans in the affidavit. Mr. Sathaye reiterated that along with affidavit of Rizwan Ghawte, original delivery challans are filed on record of the trial Court.

4. Mr. Sathaye submitted that by the impugned order, the learned trial Judge has rejected the Motion on the ground that in the affidavit of examination-in-chief, Rizwan Ghawte could have

requested for marking original delivery challans as exhibits. However, no such request was made by defendants at the time of recording of evidence of Rizwan Ghawte. The learned trial Judge accepted the submission made on behalf of plaintiffs that since the documents were not exhibited at that time, the plaintiffs could not take cross examination of those documents and if those documents are marked exhibits, it would mean that they are proved by the defendants and it could be read in evidence without giving opportunity to the plaintiffs to cross examine the defendants on the said document. The learned trial Judge held that it would cause serious prejudice to the plaintiffs.

5. I have already recorded the statement of Mr.Sathaye that along with affidavit of Rizwan Ghawte, he has produced original delivery challans. If that be so, in my opinion, the learned trial Judge should have marked them as exhibits. Mere marking of exhibits does not mean that contents thereof are proved. That apart, plaintiffs are at liberty to cross examine witness Rizwan Ghawte on this aspect.

6. It is common ground between the parties that next date of hearing before the trial Court is 17/07/2015. Mr.Sathaye assures that on that day, he will ensure that witness Rizwan Ghawte appears in the Court and faces cross examination from plaintiff's lawyer. The learned trial Judge is requested to ensure that cross examination of

Rizwan Ghawte is over at the earliest so that issue of jurisdiction under Section 9A of C.P.C can be decided within 8 weeks from today. Rule is made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)